

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STEVEN HEMPFLING, d/b/a FREE
ENTERPRISE SOCIETY,

Defendant.

1:05-cv-00594 OWW SMS

MEMORANDUM DECISION AND
ORDER DENYING DEFENDANT'S
MOTIONS TO DISMISS (DOC. 43)
AND TO STRIKE (DOC. 44) AND
SETTING SCHEDULING
CONFERENCE

SCHEDULING CONFERENCE DATE:
March 23, 2006 8:45 a.m.

I. INTRODUCTION

Plaintiff, the United States of America, brings this civil action to permanently enjoin Defendant Steven Hempfling, d/b/a the Free Enterprise Society ("Defendant" or "Hempfling"), from engaging in conduct allegedly in violation of the internal revenue laws. (See Compl., Doc. 39.) Defendant moves to dismiss Plaintiff's claims on the grounds that (i) the complaint does not allege fraudulent conduct with sufficient specificity; (ii) adjudication of the government's claims would require analysis of an issue that is non-justiciable; (iii) the claims impose an impermissible conclusive presumption against Hempfling, and (iv) the conduct is protected by the First Amendment. (Doc. 43.) Defendant also moves to strike certain portions of the complaint that make reference to the Declaration of Barbara Cantrell because that declaration is not attached to the amended complaint. (Doc. 44.)¹

¹ Plaintiff further requests that the court take judicial notice of various pleadings from *United States v. William J.*

1 **II. PROCEDURAL HISTORY**

2 On May 2, 2005, the Government filed a complaint against
3 Defendant pursuant to 26 U.S.C. § 7402(a) and § 7408, seeking to
4 permanently to enjoin him from violating and interfering with the
5 administration of the internal revenue laws. (Doc. 1, Compl.)
6 Defendant, initially proceeding *pro se*, filed his "Motion to
7 Dismiss or in the alternative for Summary Judgment" on June 29,
8 2005. (Doc. 8, Def.'s Mem.; see also Doc. 7, Motion; Doc. 9,
9 Hempfling Decl.) Defendant then acquired legal representation.
10 (Doc. 29, filed August 3, 2005.)

11 Defendant initially moved to dismiss the Government's
12 complaint on the ground that it did not state a claim under any
13 of the potentially applicable internal revenue code sections.
14 Defendant also maintained that the complaint failed to plead
15 fraud with sufficient specificity as is required by Federal Rule
16 of Civil Procedure 9(b). Finally, Defendant argued that the
17 Government should be equitably estopped from bringing this case
18 against him. The estoppel argument was construed as a motion for
19 summary judgment. Oral argument was heard on September 12, 2005.

20 By memorandum order dated September 23, 2005, Defendant's
21 estoppel argument was rejected. Defendant's motion to dismiss
22 was denied on all grounds, except on the Rule 9(b) ground.
23 Specifically, the district court reasoned:

24
25 _____
26 *Benson*, 1:04-cv-07403 (N.D. Ill.). (Doc. 50.) These court
27 records are subject to judicial notice under Federal Rule of
28 Evidence 201. See *Kourtis v. Cameron*, 419 F.3d 989, 995 n.3 (9th
Cir. 2005.) Plaintiff's request is granted.

1 Here, the Government bases its \$ 6700 claim on
2 allegedly false and fraudulent statements by Plaintiff
3 at seminars, on his website, and in his commercial tax
4 products...Allegations of fraud must include the time,
5 place, and nature of the fraudulent statements,
6 including reasons why the statements are false. The
7 claims must include the "the who, what, when, where,
8 and how" of the allegedly fraudulent conduct so that
9 the Defendant may adequately defend against the
10 allegations. Defendant does not dispute that the
11 Government's complaint adequately pleads the "who an
12 what." The Government's complaint sufficiently alleges
13 that it was Plaintiff who made the allegedly false
14 statements to individuals who participated in his
15 seminars, visited his website
16 (www.freeenterprisesociety.com), and purchased his
17 commercial tax products. In addition, Defendant's
18 complaint contains sufficient allegations of examples
19 of the content of the allegedly false statements.

20 Defendant argues that the Government fails to allege
21 the "when, where, and how." Taking the last question
22 first, the Government's complaint sufficiently alleges
23 the reasons why Defendant's allegedly false statements
24 are false. Defendant's statements, including those to
25 the effect that there is no requirement to pay income
26 tax, IRS liens are unenforceable, and that a sufficient
27 "good-faith" defense can be established if Defendant's
28 advice is followed, and the Sixteenth Amendment was
never ratified are false and misleading.

Defendant is correct, however, that Plaintiff's
complaint fails to allege where or when the seminars
took place and the commercial tax products were sold.
While Rule 9(b)'s particularity requirement is not as
stringently applied where fraud is alleged to have
occurred over a longer period of time, Plaintiff's
complaint lacks even a range of dates during which
Plaintiff held his seminars, posted information on his
website, and sold his products. Allegations of the
location of the seminars would also serve Rule 9(b)'s
purpose to protect Defendant against the potential
"pretext for the discovery of unknown wrongs."

(Doc. 37 at 13-15 (internal citations omitted) (emphasis added).)

The complaint was dismissed with leave to amend in accordance
with the above reasoning. (*Id.*)

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1 **III. FACTUAL BACKGROUND**

2 The facts as alleged in the complaint are taken as true for
3 the purpose of a motion to dismiss. *TwoRivers v. Lewis*, 174 F.3d
4 987, 991 (9th Cir. 1999).

5 The Government's claims arise out of various activities by
6 Defendant, including but not limited to conducting seminars,
7 selling commercial tax products, charging membership fees in the
8 "Free Enterprise Society" (which has optional membership fees for
9 a "civil support service" and a "legal defense fund"), and
10 posting advertisements for his commercial tax products on his
11 website (www.freeenterprisesociety.com). (*Id.* at ¶¶ 8-11, 15.)
12 Through these activities, the Government alleges that Defendant
13 "falsely purport[s] to demonstrate that: (1) there is no law
14 requiring individuals to file federal income tax returns or pay
15 income taxes; and (2) if Hempfling's customers choose to stop
16 filing tax returns, then Hempfling's 'Reliance 2000' package
17 would defeat any charge of willful failure to file a tax
18 return."² (*Id.* at ¶9.)

19 _____
20 ² Specific examples of fraudulent statements made by
21 Hempfling in his commercial tax products (including the Reliance
22 2000 package, the W4 package, and seminar materials) include:

- 23 a. "There is **No Law** that Requires an Individual to
24 file income tax returns." (2005 seminar flyer,
25 emphasis supplied)
- 26 b. "The income tax has never been anything but
27 voluntary." (website description of Seminar 1)
- 28 c. "Over 1500 Reasons Why It May No [sic] Be A Good
 Idea To File INCOME Tax Returns. The Choice Is
 Yours." (website description of Seminar 8901)

Hempfling offers a "Reliance 2000" program that the Government claims is used to facilitate, encourage, and assist Hempfling's customers to commit willful failure to file an income tax return. (*Id.* at ¶12) The "Reliance 2000" Program has four steps: (1) buy (for \$80) and read a two-volume book by William "Bill" Benson titled *The Law That Never Was*, which falsely concludes that the Sixteenth Amendment was never ratified; (2) buy (for \$250) The *16th Amendment Reliance Package* from Hempfling, which contains the "initial research" for Benson's book; (3) buy (for \$50-75) and send Hempfling's Redress of Grievance Letter Package to the President, congressmen, and senators, which asks the recipients to answer questions about the ratification of the Sixteenth Amendment; and (4) buy (for \$150 and up) and file Hempfling's federal lawsuit package "asking for

-
- d. "IRS Liens and Levies Are Unenforceable."
(website description of Seminar 9201)
 - e. "[The Reliance 2000 package] will help stop Failure to File charges, and if charged, will make a very formidable defense." (website description of Reliance 2000)
 - f. "[The procedure set out in the W4 Alternative Withholding Package] can mean more take home pay as this procedure stops the federal withholding from your paycheck." (description of W-4 package)
 - g. "The above programs are designed for income tax filers or non-filers alike. For non-filers these programs are **essential to respond legally to the taxing agencies.**" (membership information, emphasis supplied)

(Compl. ¶18)

1 an answer to the 16th Amendment question"). (*Id.*)

2 Furthermore, Hempfling advises his customers to purchase his
3 Reliance 2000 program, take these four steps, and stop filing tax
4 returns, in order to later be able to raise a good-faith defense
5 against tax evasion. (*Id.* at ¶13.) Hempfling bases his advice
6 on the United Supreme Court's decision in *United States v. Cheek*,
7 498 U.S. 192, 203 (1991), which held that an honest, good-faith
8 belief, no matter how unreasonable, that one was not required to
9 pay taxes or to file a tax return could defeat a "willfulness"
10 finding. The Government alleges that "in essence, Hempfling's
11 Reliance 2000 program is a ready-made--and entirely fraudulent--
12 *Cheek* defense." (*Id.*)

13 Hempfling runs a club or organization called the "Free
14 Enterprise Society," through which he promotes his commercial tax
15 products (including "Reliance 2000" as well as a "W4 Package")
16 and for which membership costs \$45 per year. Members may attend
17 seminars at no additional charge. (*Id.*)

18 Members of the Free Enterprise Society may join the "civil
19 support service" for an additional \$20 per year, not including
20 additional fees for letter-writing, brief-writing, and other one-
21 on-one services. (*Id.* at ¶ 10.) Members may also join (for \$950
22 for the first year and \$300 for each additional year) the "legal
23 defense fund," which is described by Hempfling "as protection for
24 those who have chosen to take the 'political stand' that they are
25 not required to file federal income tax returns." (*Id.* at ¶10.)
26 Hempfling promises to pay for fund members' legal representation.
27 (*Id.* at ¶ 14.) The Government further alleges that "the legal
28 defense fund also facilitates, encourages, and assists

Hempfling's customers to evade the payment of federal income taxes." (*Id.* at ¶11.)

Plaintiff also has a website (www.freeenterprisesociety.com) on which he sells the same commercial tax products described above, as well as books and other materials. (*Id.* at ¶15.) The Government seeks only to enjoin Hempfling from advertising or distributing those materials that are subject to penalties under § 6700 or § 6701. (*Id.* at ¶17.)

IV. STANDARD OF REVIEW

A. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6).

Federal Rule of Civil Procedure 12(b)(6) allows a defendant to attack a complaint for failure to state a claim upon which relief can be granted. A Rule 12(b)(6) motion is disfavored and rarely granted: "[a] complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Van Buskirk v. CNN, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (citations omitted). In deciding whether to grant a motion to dismiss, the court "accept[s] all factual allegations of the complaint as true and draw[s] all reasonable inferences in favor of the nonmoving party." *TwoRivers*, 174 F.3d at 991.

"The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Spewell v. Golden State Warriors*,

266 F.3d 979, 988 (9th Cir. 2001) (citations omitted). For example, matters of public record may be considered under Fed. R. Civ. P. 201, including pleadings, orders and other papers filed with the court or records of administrative bodies. See *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Conclusions of law, conclusory allegations, unreasonable inferences, or unwarranted deductions of fact need not be accepted. See *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

B. Pleading Fraud Under Federal Rule of Civil Procedure 9(b).

Rule 9(b) of the Federal Rules of Civil Procedure states that:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

A complaint alleging fraud meets the Rule 9(b) standard if it alleges the time, place, and content of the fraudulent statements, including reasons why the statements are false. In *re GlenFed., Inc., Securities Litig.*, 42 F.3d 1541, 1547-48 (9th Cir. 1994) (en banc), *rev'd on other grounds*, 60 F.3d 591 (9th Cir. 1995). Where fraud allegedly occurred over a period of time, however, Rule 9(b)'s requirement that the circumstances of fraud to be stated with particularity are less stringently applied. See *Fujisawa Pharm. Co., Ltd. v. Kapoor*, 814 F. Supp. 720, 726 (N.D. Ill. 1993); *United States ex rel. Semtner v. Med. Consultants, Inc.*, 170 F.R.D. 490, 497 (W.D. Okla. 1997).

One of the purposes behind Rule 9(b)'s heightened pleading requirement is to put defendants on notice of the specific fraudulent conduct in order to enable them to adequately defend against such allegations. See *In re Stac Elec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996). Furthermore, Rule 9(b) serves "to deter the filing of complaints as a pretext for the discovery of unknown wrongs, to protect [defendants] from the harm that comes from being subject to fraud charges, and to prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous social and economic costs absent some factual basis." *Id.*

V. DISCUSSION

A. Statutory Background.

The United States seeks an injunction against Defendant under sections 6700 and 7408 of the Internal Revenue Code, 28 U.S.C. §§ 6700, 7408 [IRC §§ 6700, 7408].

Congress added the statutory provisions that apply to this litigation, I.R.C. Sections 6700 and 7408, as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"). The government must prove five elements to obtain an injunction under these statutes:

- (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement;
- (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement;
- (3) they knew or had reason to know that the statements were false or fraudulent;
- (4) the false or fraudulent statements pertained to a material matter; and
- (5) an injunction is necessary to prevent recurrence of this conduct. I.R.C. §§ 6700(a), 7408(b).

1 The government bears the burden of proving each element
2 by a preponderance of the evidence. The traditional
3 requirements for equitable relief need not be satisfied
since Section 7408 expressly authorizes the issuance of
an injunction.

4 *United States v. Estate Preservation Serv.*, 202 F.3d 1093, 1098
5 (9th Cir. 2000) (internal citations omitted).

6
7 **B. Compliance with Fed. R. Civ. P. 9(b).**

8 The initial complaint was dismissed with leave to amend on
9 the ground that the allegations of fraud were not pled with
10 sufficient specificity;

11 _____...Plaintiff's complaint fails to allege where or when
12 the seminars took place and the commercial tax products
[that] were sold. While Rule 9(b)'s particularity
13 requirement is not as stringently applied where fraud
is alleged to have occurred over a longer period of
14 time, Plaintiff's complaint lacks even a range of dates
during which Plaintiff held his seminars, posted
15 information on his website, and sold his products.
Allegations of the location of the seminars would also
16 serve Rule 9(b)'s purpose to protect Defendant against
the potential "pretext for the discovery of unknown
17 wrongs."

18 (Doc. 37 at 15 (emphasis added).)

19 Plaintiff then filed an amended complaint. (Doc. 39.)
20 Defendant argues that the amended allegations are still not
21 specific enough to satisfy the requirements of Rule 9(b).
22 Defendant first argues that the "amended complaint only contains
23 some very general time-frames (month and year), and only
24 identifies some very general cites as the locations." (Doc. 43
at 2.)

25 But, here, the fraud allegedly occurred over a period of
26 time. In such circumstances Rule 9(b)'s particularity
27 requirement is less stringently applied. See *Fujisawa*, 814 F.
28

1 Supp. at 726; *Semtner*, 170 F.R.D. at 497. The complaint alleges
2 generally that the fraudulent conduct occurred between 2003 and
3 2005 (Compl. at ¶5), and sets forth specific dates on which
4 Hempfling conducted-tax related seminars.

5 Hempfling, operating under the name "Free Enterprise
6 Society," conducts tax-related seminars. These include
7 the seminars conducted by defendant in November of 2003
8 in Fresno, Santa Clara and Sacramento, California, and
9 in Costa Mesa, San Diego and North Hollywood,
10 California, in December of 2003. Hempfling also
11 promoted his commercial tax products at the 2004 Tax
12 Freedom Rally that was held on August 28 and 29, 2004
13 in Sunnyvale, California.

14 (*Id.* at ¶8 (emphasis added).) At these seminars "and continuing
15 to the present day," it is alleged that Hempfling promoted
16 commercial tax products, which "falsely represent or purport to
17 demonstrate that: (1) there is no law requiring individuals to
18 file federal income tax returns or pay income taxes; and (2) if
19 Hempfling's customers choose to stop filing tax returns, then
20 Hempfling's Reliance 2000 program would defeat any charge of
21 willful failure to file a tax return." (*Id.* at ¶9.)

22 The complaint also alleges that "[s]ince 2004 (and
23 continuing to the present)," Hempfling promoted and offered
24 various memberships and services, for which he charged fees.
25 Specifically, these memberships were promoted and offered for
26 sale at the "2004 Tax Freedom Rally that was held on August 28
27 and 29, 2004 in Sunnyvale, California." (*Id.* at ¶11.) Also
28 offered for sale at his seminars, including at those seminars
specifically described in paragraph 8 of the Complaint, was
Hempfling's "Reliance 2000" program. The complaint alleges that
this program "is used to facilitate, encourage and assist
Hempfling's customers to willfully fail to file federal tax

1 returns and evade federal taxes." (*Id.* at ¶12.). Moreover,
2 "[t]hrough advertising and on his website
3 (www.freeenterprisesociety.com), between 2003 and 2005 (and at
4 other times that will be ascertained through discovery),
5 Hempfling sells the same commercial tax products and services
6 described above, in addition to books and other materials." (*Id.*
7 at ¶15.) These allegations give Defendant adequate notice of the
8 "specific fraudulent conduct" of which he is accused and enable
9 him to "adequately defend against such allegations." *Stac Elec.*
10 *Litig.*, 89 F.3d at 1405.

11 Defendant further argues that "the complaint fails to allege
12 any sales of anything." This is not an accurate portrayal of the
13 complaint, which specifically alleges that "on or about July 20,
14 2005," Barbara Cantrell printed out a copy of the "Information
15 Package and Freedom Library" for sale at
16 www.freeenterprisesociety.com. (Compl. at ¶15.) This library
17 "describes in detail the commercial products and services that
18 Hempfling has promoted and offered for sale from 2003 to the
19 present."³ "On or about January 5, 2005," Barbara Cantrell
20 ordered three commercial tax products from Hempfling's Free
21 Enterprise Society: (a) the "W4 Alternative Withholding Package"
22 (price: \$50); (b) the "IRS Lien and Levy Package" (price: \$50);
23 and (c) the "All Seminar Set: Sem 15 July 2004" (price: \$195).
24 (*Id.* at ¶16.)

25 Defendant next objects that the "complaint does not allege
26

27 ³ These paragraphs are subject to the motion to strike,
28 which is denied as discussed *infra* at Part V.D.

1 that Hempfling himself made any false/fraudulent statements at
2 any of the dates or locations specified in the complaint."
3 Specifically, Hempfling points to paragraph 9 of the complaint
4 which refers to "previously recorded seminars." Hempfling
5 asserts that these "previously recorded seminars" are the only
6 "commercial tax products" alleged to have been promoted or
7 distributed at the seminars. Again, this is not a fair reading
8 of the complaint. Paragraph 9 alleges in its entirety:

9 9. At the seminars mentioned above, and continuing to the
10 present day, Hempfling promotes his commercial tax
11 products. These include Hempfling's previously recorded
12 seminars, W4 package, the IRS lien and levy package,
13 and the "Reliance 2000" program. These commercial tax
14 products falsely represent or purport to demonstrate
15 that: (1) there is no law requiring individuals to file
16 federal income tax returns or pay income taxes; and (2)
17 if Hempfling's customers choose to stop filing tax
18 returns, then Hempfling's "Reliance 2000" program would
19 defeat any charge of willful failure to file a tax
return. Hempfling, through the internet and seminars
conducted by the "Free Enterprise Society," as
identified above, also offers a "civil support service"
which entitles members to obtain - for additional fees
- customized tax related legal briefs and
correspondence, and a "legal defense fund" for
nonfilers that provides those charged with the willful
failure to file federal income tax returns with
behind-the-scenes assistance from the Free Enterprise
Society and, if necessary, legal representation.

20 (*Id.* at ¶9. (emphasis added).) Contrary to Defendant's
21 assertions, this paragraph does not restrict the category of
22 "commercial tax products" promoted at the seminars to the
23 "previously recorded seminars." Rather, it makes specific
24 reference to other products. In addition, this paragraph plainly
25 alleges that these products contain false representations.

26 Defendant further argues that "there is no specific
27 allegation that [Hempfling] actually participated in any such
28 seminars." Although technically correct, his participation,

1 either directly or indirectly in organizing, promoting, and
2 running the seminars is impliedly alleged.

3 Defendant then takes this argument one step further:

4 If it is the government's contention that the
5 "products" contain the "false/fraudulent" statements,
6 then the face of the amended complaint itself shows the
7 dates alleged for any fraud claim simply cannot be
8 correct. Since the complaint specifies the "products
9 in question were "previously recorded" and there are no
10 allegations that Hempfling made any false-fraudulent
11 statements at the general dates and locations alleged
12 in the complaint, then the actual dates of the alleged
13 false/fraudulent "previously recorded" statements could
14 not possibly be the dates or locations identified in
15 the complaint.

16 (Doc. 43 at ¶3.)

17 The government responds by emphasizing the statutory
18 provision upon which this fraud claim is based. Section
19 6700(a)(2) of the Code penalizes any person "who makes or
20 furnishes or causes another person to make or furnish...(A) a
21 statement with respect to...the securing of any other tax benefit
22 by reason of holding an interest in the entity or participating
23 in the plan or arrangement which the person knows or has reason
24 to know is false or fraudulent as to any material matter..." IRC
25 § 6700(a)(2)(A). The plain language of this provision does not
26 require that the allegedly fraudulent statement be authored on
27 the dates alleged in the complaint. Rather, it is enough if the
28 Defendant "furnishes" or "causes another person to...furnish"
such a false statement at the seminars. No more is required
under the statute or under Rule 9(b).

29 This reasoning also disposes of Defendants alternative
30 argument based upon *Alan Neuman Productions, Inc. v. Albright*,
31 862 F.2d 1388, 1392 (9th Cir. 1988). Defendant argues that the

1 commercial tax products allegedly promoted and sold at the
2 seminars and on the internet were authored by William "Bill"
3 Benson, not Hempfling. Hempfling asserts that he should not be
4 held liable for the "alleged misrepresentations written in a book
5 authored by someone else." The United States does not allege
6 that Hempfling authored all of the allegedly fraudulent
7 documents, but the United States does allege that Hempfling
8 furnished those materials to others. No more is needed to
9 survive this motion to dismiss.⁴

10
11 **C. Jurisdictional Arguments.**

12 **1. Subject Matter Jurisdiction Over Dispute Regarding**
13 **Ratification of the Sixteenth Amendment.**

14 Defendant dedicates approximately eleven (11) pages of his
15 motion to a novel but unpersuasive argument. Hempfling insists
16 that subject matter jurisdiction is lacking because the nature of
17 the government's fraud allegations would require this court to
18 determine whether the Sixteenth Amendment was properly ratified.
19 More specifically, Defendant argues that his opinions regarding
20 the federal income tax are based upon "research performed and
21 published by the accomplished authors William J. Benson and M.J.
22 'Red' Beckman, which factually unrefuted, concludes that the
23 Sixteenth Amendment was not ratified." (Doc. 43 at 8.)
24 Therefore, Hempfling insists that, in order to establish
25 liability here, the Government must "prove that the Sixteenth

26
27 ⁴ Hempfling's related argument raised in the context of a
28 defense based upon the First Amendment is discussed infra at Part
V.C.2.

1 Amendment was properly ratified." (*Id.*) Defendant further
2 asserts that "[a] review of the case law shows there is unanimous
3 judicial concurrence that the courts of the United States are
4 absolutely precluded from addressing this issue" (i.e., the
5 validity of the Sixteenth Amendment). (*Id.*)

6 First, it is ironic that the emphasis Defendant places upon
7 this non-justiciability argument would cause anyone who
8 participated in the "Reliance 2000" Program to question the
9 fourth step, which is to "Purchas[e](for \$150 and up) and fil[e]
10 Hempfling's federal lawsuit package 'asking for an answer to the
11 16th Amendment question.'" (Compl. at ¶12.) Hempfling's
12 customers may find some solace in the fact that Defendant's non-
13 justiciability defense is meritless. The validity of the
14 Sixteenth Amendment has long been established.

15 For over 75 years, the Supreme Court and the lower
16 federal courts have both implicitly and explicitly
17 recognized the Sixteenth Amendment's authorization of a
18 non-apportioned direct income tax on United States
citizens residing in the United States and thus the
validity of the federal income tax laws as applied to
such citizens. [Citing numerous cases.]

19 *In re Becraft*, 885 F.2d 547, 548 (9th Cir. 1989). Defendant
20 attempts to distinguish this line of cases on the ground that the
21 specific issue of "apportionment" is not raised by the complaint.
22 (Doc. 52, Deft's Reply, at 7 n.6.) But the holding from *In re*
23 *Becraft* cannot be construed so narrowly. It stands for the
24 general proposition that the validity of the Sixteenth Amendment
25 unequivocally is settled law.

26 Defendant points to several cases specifically concerned
27 with the validity of the ratification process, placing particular
28 emphasis on discussions within these cases of justiciability

1 doctrines. But, Defendant chooses to ignore that these cases
2 universally uphold the validity of the Sixteenth Amendment and
3 the ratification process. For example, Defendant quotes at
4 length from *United States v. Thomas*, 788 F.2d 1250, 1254 (7th
5 Cir. 1986), which addresses the argument of a tax protestor who
6 maintained "that he did not need to file tax returns because the
7 sixteenth amendment is not part of the constitution."

8 It was not properly ratified, Thomas insists, repeating
9 the argument of W. Benson & M. Beckman, *The Law That*
10 *Never Was* (1985). Benson and Beckman review the
11 documents concerning the states' ratification of the
12 sixteenth amendment and conclude that only four states
13 ratified the sixteenth amendment; they insist that the
14 official promulgation of that amendment by Secretary of
15 State Knox in 1913 is therefore void.

16 Benson and Beckman did not discover anything; they
17 rediscovered something that Secretary Knox considered
18 in 1913. Thirty-eight states ratified the sixteenth
19 amendment, and thirty-seven sent formal instruments of
20 ratification to the Secretary of State. (Minnesota
21 notified the Secretary orally, and additional states
22 ratified later; we consider only those Secretary Knox
23 considered.) Only four instruments repeat the language
24 of the sixteenth amendment exactly as Congress approved
25 it. The others contain errors of diction,
26 capitalization, punctuation, and spelling. The text
27 Congress transmitted to the states was: "The Congress
28 shall have power to lay and collect taxes on incomes,
from whatever source derived, without apportionment
among the several States, and without regard to any
census or enumeration." Many of the instruments
neglected to capitalize "States," and some capitalized
other words instead. The instrument from Illinois had
"remuneration" in place of "enumeration"; the
instrument from Missouri substituted "levy" for "lay";
the instrument from Washington had "income" not
"incomes"; others made similar blunders.

Although Thomas urges us to take the view of several
state courts that only agreement on the literal text
may make a legal document effective, the Supreme Court
follows the "enrolled bill rule." If a legislative
document is authenticated in regular form by the
appropriate officials, the court treats that document
as properly adopted. *Field v. Clark*, 143 U.S. 649
(1892). The principle is equally applicable to

1 constitutional amendments. See *Leser v. Garnett*, 258
2 U.S. 130 (1922), which treats as conclusive the
3 declaration of the Secretary of State that the
4 nineteenth amendment had been adopted. In *United States*
5 *v. Foster*, 789 F.2d 457, 462-63 & n.6 (7th Cir. 1986),
6 we relied on *Leser*, as well as on the inconsequential
7 nature of the objections in the face of the 73-year
8 acceptance of the effectiveness of the sixteenth
9 amendment, to reject a claim similar to Thomas's. See
also *Coleman v. Miller*, 307 U.S. 433 (1939) (questions
about ratification of amendments may be
nonjusticiable). Secretary Knox declared that enough
states had ratified the sixteenth amendment. The
Secretary's decision is not transparently defective. We
need not decide when, if ever, such a decision may be
reviewed in order to know that Secretary Knox's
decision is now beyond review.

10 (parallel citations omitted).

11 Defendant also cites *United States v. Stahl*, 792 F.2d 1438,
12 1440 (9th Cir. 1986), where the Ninth Circuit considered an
13 argument that the Sixteenth Amendment was fraudulently certified.
14 The following reasoning from that case is relevant:

15 Stahl's claim that ratification of the sixteenth
16 amendment was fraudulently certified constitutes a
17 political question because we could not undertake
18 independent resolution of this issue "without
19 expressing lack of the respect due coordinate branches
20 of government." *Id.* In *Field v. Clark*, 143 U.S. 649
21 (1892), the Court encountered a claim that a bill had
22 not in fact been passed by Congress. The Court held
23 that when a bill has been signed by the Speaker of the
24 House and by the President of the Senate and has
25 received the President's approval, "its authentication
26 as a bill that has passed Congress should be deemed
complete and unimpeachable....The respect due to
coequal and independent departments requires the
judicial department...to accept, as having passed
Congress, all bills authenticated in the manner
stated." *Id.* at 672. Significantly, the Court noted the
possibility that the Speaker of the House and the
President of the Senate could fraudulently impose on
the people a bill that was never passed by Congress.
But "[j]udicial action based upon such a suggestion is
forbidden by the respect due to a coordinate branch of
the government." *Id.* at 673.

27 //

28 //

In *Leser*, the Court, confronting the claim that ratifying resolutions of two states were inoperative, extended the rule declared in *Field* to the Secretary of State's authentication that a constitutional amendment had been duly ratified. 258 U.S. at 137, 42 S.Ct. at 218. Baker indicates that the application of the political question doctrine in *Leser* was demanded by the respect due coordinate branches. Baker, 369 U.S. at 214.

Stahl's claim falls plainly within the confines of *Leser* and *Field*. Stahl's claim rests on an assertion that the ratifying resolutions of many states were inoperative. Since the Secretary of State proclaimed that the sixteenth amendment had been duly ratified, this assertion presents a political question under *Leser*. Stahl's suggestion of fraud on the part of the Secretary does not render the question justiciable, for "[j]udicial action based upon such a suggestion is forbidden by the respect due to a coordinate branch of the government." *Field*, 143 U.S. at 673. Moreover, in Baker, the Court in discussing judicial review of the ratification process characterized the political question doctrine as "a tool for maintenance of governmental order." Baker, 369 U.S. at 215. Consideration of Stahl's contention, 73 years after certification of the amendment's adoption and after countless judicial applications, would promote only disorder. See *United States v. Foster*, 789 F.2d 457, 462-63 (7th Cir. 1986).

We conclude that the Secretary of State's certification under authority of Congress that the sixteenth amendment has been ratified by the requisite number of states and has become part of the Constitution is conclusive upon the courts.

Id. at 1440 (parallel citations omitted).⁵

Defendant asserts that three rules "clearly emerge" from

⁵ Defendant focuses on the opening sentence from this quotation ("Stahl's claim that ratification of the sixteenth amendment was fraudulently certified constitutes a political question because we could not undertake independent resolution of this issue without expressing lack of the respect due coordinate branches of government") and asserts that this is the holding of the case. But, this is a sentence fragment that appears to be the Ninth Circuit's attempt to restate Stahl's own argument. This interpretation is confirmed by the final paragraph of the excerpt which concludes that the ratification of the sixteenth amendment is "conclusive upon the courts."

1 *Thomas and Stahl:*

- 2 (1) the Seventh and Ninth Circuit addressed no issue
3 other than what Secretary Knox himself addressed;
4 (2) that because the Supreme Court follows the
5 "enrolled bill rule," the doctrine of non-
6 justiciable political questions prohibits a court
7 from addressing the issue, and imposes a duty to
8 accept Knox's proclamation that the Sixteenth
9 Amendment was ratified; and
10 (3) that Secretary Knox's decision is now beyond
11 [court] review.

12 (Doc. 43 at 10.)

13 Defendant then (in a confusing and unnecessarily indirect
14 manner) makes the remarkable assertion that the line of cases
15 accepting Secretary Knox's proclamation, including *Thomas, Stahl,*
16 and others, e.g., *United States v. Benson*, 941 F.2d 598, 607 (7th
17 Cir. 1991), should be disregarded because he possesses evidence
18 of non-ratification that Secretary Knox never considered. (*Id.*
19 at 13-15.)⁶ But Defendant places too much weight on whether
20 particular pieces of evidence were or were not considered by
21 Secretary Knox. The cases suggest that such fine line-drawing is
22 not appropriate. For example, in *United Stats v. Sitka*, 845 F.2d
23 43, 47 (2d Cir. 1988), the Second Circuit reasoned:

24 The Sixteenth Amendment was proposed by Congress and
25 ratified by the states in accordance with procedures set out
26 in Article V of the Constitution, and its ratification was
27 then certified after careful scrutiny by a member of the
28 executive branch acting pursuant to statutory duty. The
validity of that process and of the resulting constitutional
amendment are no longer open questions.

To accept Hempfling's contrary assertion -- that the question may

⁶ Although Defendant describes this new evidence in detail, its substance and nature are not relevant to the instant inquiry.

1 be re-opened upon the discovery of "new evidence" concerning the
2 ratification -- would fly in the face of the very purpose of the
3 political question doctrine, which serves as "a tool for
4 maintenance of governmental order." *Baker v. Carr*, 369 U.S. 186,
5 215 (1962).

6 Defendant's argument that this case is non-justiciable
7 because it concerns the validity of the Sixteenth Amendment is
8 not well founded. His motion to dismiss on this ground is
9 **DENIED.**

10 **2. Indispensable Party.**

11 Defendant makes a related argument that this case must be
12 dismissed under Federal Rule of Civil Procedure 19 for failure to
13 name an indispensable party, namely the United States Congress.
14 (Doc. 43 at 20-21.) As discussed, the validity of the Sixteenth
15 Amendment is no longer in question. Defendant's "new evidence"
16 is not grounds for a court to disregard the line of cases that so
17 hold. Accordingly, the United States Congress is not an
18 indispensable party to this litigation. Defendant's motion to
19 dismiss on this ground **DENIED.**

20 **3. Conclusive Presumption.**

21 Similarly, Defendant argues that the cases discussed above
22 "require this court to accept as a conclusive presumption the
23 ratification of the Sixteenth Amendment." (Doc. 43 at 18
24 (emphasis added).) Defendant uses the catch-phrase "conclusive
25 presumption" in an apparent attempt to benefit from a line of
26 Supreme Court cases holding unconstitutional the use of
27 "conclusive presumptions" that operate to take the issue of
28 intent away from a jury "where the intent of the accused is an

1 ingredient of the crime charged." See e.g., *Sandstrom v.*
2 *Montana*, 442 U.S. 510, 521-23 (1979); see also *Stanley v.*
3 *Illinois*, 405 U.S. 645, 654-57 (1972). This line of cases is
4 simply inapposite here. Defendant's motion to dismiss on this
5 ground is **DENIED**.

6 **4. Is the Alleged Conduct Protected by the First**
7 **Amendment?**

8 Throughout his motion to dismiss, Defendant argues that the
9 conduct alleged in the complaint is protected by the First
10 Amendment. Although much of Defendant's reasoning in support of
11 this argument is contained within the section of his brief
12 attacking the complaint under Rule 9(b) for lack of specificity,
13 it is more appropriate to construe his First Amendment argument
14 as a motion to dismiss for failure to state a claim.

15 In general, defendant argues that all of the allegedly
16 fraudulent statements are opinions (either his own or those of
17 others) "formed based upon case law created by the United States
18 Circuit Courts and the United States Supreme Court." (Doc. 43.
19 at 8.) Defendant insists that "[a] matter of opinion [is]
20 protected by the First Amendment." (*Id.*)

21 Defendant's position is untenable. The Supreme Court has
22 repeatedly held that the First Amendment does not shield fraud.
23 *Madigan v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 612 (2003);
24 *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 340 (1974) (an
25 "intentional lie" plays "no essential part of any exposition of
26 ideas.").

27 Defendant quotes several general principles of First
28 Amendment jurisprudence that simply do not control the outcome of

1 this case. For example, Defendant cites *Hudgens v. NLRB*, 424
 2 U.S. 507, 520 (1976) for the proposition that the government may
 3 not "discriminate in the regulation of expression on the basis of
 4 the content of that expression." First, although the general
 5 proposition quoted in *Hudgens* -- that the government may not
 6 "discriminate in the regulation of expression on the basis of the
 7 content of that expression" -- is valid, it is well settled that
 8 Congress may proscribe fraudulent conduct.

9 Where it has been determined that [] statements
 10 regarding [tax advice], which constitute commercial
 11 speech, are misleading in the context contemplated by
 12 Congress in enacting the [sections 6700 and 7408], and
 13 the injunction prohibiting such statements is
 14 adequately tailored and construed to enjoin only such
 15 commercial speech which has been shown to be both
 16 misleading and likely to promote illegal activity, such
 17 representations are not protected by the First
 18 Amendment against restraint authorized by section 7408
 19 and properly found necessary in the particular case to
 20 prevent recurrence of the denounced conduct.

21 *United States v. Estate Preservation Serv.*, 202 F.3d 1093, 1106
 22 (9th Cir. 2000) (citing *United States v. Buttorff*, 761 F.2d 1056,
 23 1066 (5th Cir. 1985)).⁷ Whether the United States can establish

24 ⁷ Although the *Hudgens* court did discuss this general
 25 principle of First Amendment jurisprudence, the Court then found
 26 that "the constitutional guarantee of free expression has no part
 27 to play" under the facts and circumstances of the *Hudgens* case.
 28 *Id.* at 521. *Hudgens* owned a shopping center and harassed
 striking members of a union who were picketing in front of their
 employer's store, located within *Hudgens'* shopping center. The
 National Labor Relations Board found that *Hudgens'* conduct
 violated the National Labor Relations act and successfully sought
 and enforced an injunction against *Hudgens*. In reviewing
Hudgens' appeal from that injunction, the Supreme Court analyzed
 whether the First Amendment provided additional protection to the
 picketing union members. After a lengthy discussion, the Supreme
 Court decided that the First Amendment did not protect the union.
 Rather, the National Labor Relations Act provided the applicable
 rules of decision. This is just one of several instances in

1 the elements required for such an injunction to issue remains to
2 be determined at a later stage of the case.

3 Defendant also attempts to draw a distinction between his
4 conduct and fraud by arguing that the commercial tax products he
5 allegedly promoted and sold were written by another person --
6 William "Bill" Benson. Hempfling asserts that he should not be
7 held liable for the "alleged misrepresentations written in a book
8 authored by someone else." He then argues in a footnote "[i]f
9 the Court wants to go down this road, then every bookstore in
10 America had better start screening every book it sells for
11 'misrepresentations.'" (Doc. 43 at 5 n.3.) Defendant provides no
12 support for this proposition, however. To the contrary, it is
13 well-established that the First Amendment does not protect those
14 who aid and abet criminal conduct by the dissemination of printed
15 materials that incite crimes. *United States v. Barnett*, 667 F.2d
16 835, 842-43 (9th Cir. 1982) (First Amendment does not protect
17 dissemination of instructions for the manufacture of controlled
18 substances); see also *Rice v. Paladin Enterprises, Inc.*, 128 F.3d
19 233 (4th Cir. 1997) (First Amendment does not protect publisher
20 of manual instructing reader how to operate as a "hit man"). If
21 Hempfling knew or had reason to know that the statements
22 contained within the commercial tax products were false and/or
23 fraudulent, he cannot hide behind the First Amendment simply by
24 asserting that he did not author those products himself.
25 Defendant's motion to dismiss based on the First Amendment is
26 **DENIED.**

27 _____
28 which counsel for Defendant presents quotes out of context.

1 **5. *Noerr-Pennington Doctrine.***

2 Defendant also maintains that some of the allegedly unlawful
3 conduct described in the complaint is protected by the *Noerr-*
4 *Pennington* doctrine, which protects the right to petition the
5 government for redress of grievances. See *Eastern R. Conf. v.*
6 *Noerr Motors*, 365 U.S. 127 (1961); *Mine Workers v. Pennington*,
7 381 U.S. 657 (1965).

8 Under the *Noerr-Pennington* doctrine, those who petition
9 all departments of the government for redress are
10 generally immune from liability....*Noerr-Pennington* is
11 a label for a form of First Amendment protection; to
say that one does not have *Noerr-Pennington* immunity is
to conclude that one's petitioning activity is
unprotected by the First Amendment.
12 *Empress LLC v. City and County of San Francisco*, 419 F.3d 1052,
13 1056-57 (2005) (internal quotations and citations omitted).

14 The *Noerr-Pennington* doctrine was originally created to
15 immunize individuals and entities from antitrust liability, where
16 the alleged anticompetitive behavior is the filing of a series of
17 lawsuits.⁸ *Id.* *Noerr-Pennington* was later found to apply to
18 claims brought under § 1983, where the allegedly unlawful act
19 involved petitioning or lobbying the government for the redress
20 of grievances. *Id.* Defendant cites no cases which apply *Noerr-*
21 *Pennington* in factual or legal circumstances similar to this
22 case. However, even if *Noerr-Pennington* did apply as a general
23 matter to such conduct, there is a "sham" exception to the *Noerr-*
24 *Pennington* doctrine that is applicable here. The Ninth Circuit
25 discussed this exception in the context of an anti-trust case in
26

27 ⁸ In this way, the *Noerr-Pennington* doctrine is a cousin
28 to modern Anti-Slapp statutes.

1 *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056, 1060-61
2 (1998).

3 In *Noerr*, the Court acknowledged that "[t]here may be
4 situations in which a publicity campaign, ostensibly
5 directed toward influencing governmental action, is a
6 mere sham to cover what is actually nothing more than
7 an attempt to interfere with the business relationships
8 of a competitor, and the application of the Sherman Act
9 would be justified." 365 U.S. at 144. In *City of*
10 *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S.
11 365 (1991), the Court explained:

8 The "sham" exception to *Noerr* encompasses
9 situations in which persons use the governmental
10 process-as opposed to the outcome of that
11 process-as an anticompetitive weapon. A classic
12 example is the filing of frivolous objections to
13 the license application of a competitor, with no
14 expectation of achieving denial of the license but
15 simply in order to impose expense and delay. A
16 "sham" situation involves a defendant whose
17 activities are not genuinely aimed at procuring
18 favorable government action at all, not one who
19 genuinely seeks to achieve his governmental
20 result, but does so through improper means. (*Id.*
21 at 380.)

15 (parallel citations omitted.) The Ninth Circuit in *Kottle* went
16 on to describe the types of conduct that might constitute a
17 "sham" under various circumstances.

18 Although the *Noerr-Pennington* doctrine applies to
19 activities directed at any branch of government, the
20 scope of the sham exception depends on the type of
21 governmental entity involved....When the branch of
22 government involved is a court of law, this circuit
23 recognizes three circumstances in which an antitrust
24 defendant's activities might fall into the sham
25 exception. First, if the alleged anticompetitive
26 behavior consists of bringing a single sham lawsuit (or
27 a small number of such suits), the antitrust plaintiff
28 must demonstrate that the lawsuit was (1) objectively
baseless, and (2) a concealed attempt to interfere with
the plaintiff's business relationships.

26 Second, if the alleged anticompetitive behavior is the
27 filing of a series of lawsuits, the question is not
28 whether any one of them has merit-some may turn out to,
just as a matter of chance-but whether they are brought
pursuant to a policy of starting legal proceedings
without regard to the merits and for the purpose of
injuring a market rival.

1 Finally, in the context of a judicial proceeding, if
2 the alleged anticompetitive behavior consists of making
3 intentional misrepresentations to the court, litigation
4 can be deemed a sham if a party's knowing fraud upon,
5 or its intentional misrepresentations to, the court
6 deprive the litigation of its legitimacy.

7 *Id.* at 1060 (internal citations and quotations omitted).

8 The *Kottle* court then cautioned that it might be more
9 difficult to prove that lobbying or petitioning a legislature
10 constituted a "sham."

11 It is obvious that these three ways in which litigation
12 might be a sham do not necessarily extend beyond the
13 litigation context. For instance, if the alleged
14 anticompetitive behavior consisted of lobbying a []
15 legislature (as in *Noerr*), rather than filing a suit
16 in [] court, it would seem quite pointless to ask
17 whether the lobbying effort was "objectively baseless."
18 To decide objective baselessness, we would need
19 objective standards, of which there are few, if any, in
20 the political realm of legislation, against which to
21 measure the defendant's conduct.

22 Similarly, the second and third variants of the
23 litigation sham exception do not make sense in the
24 legislative realm. Subjecting a defendant to antitrust
25 liability because it pursued a pattern of baseless
26 legal claims does not generate the same collateral
27 consequences as subjecting the same defendant to
28 antitrust liability because it engaged in numerous
unsuccessful attempts to lobby a [] legislature-the
latter would eviscerate the Petition Clause. And the
sham exception for intentional fraud on a court cannot
lightly be taken to apply in a legislative context
because, as the Supreme Court has observed, the
political arena has a higher tolerance for outright
lies than the judicial arena does.

22 *Id.* at 1061. Arguendo, some of the conduct alleged in this case
23 appears to be of this latter variety (i.e., lobbying/petitioning
24 a legislature). For example, the third step of Hempfling's four-
25 step "Reliance 2000" program is "Purchasing (for \$250) from
26 Hempfling the "Redress of Greivance Letter Package," which asks
27 questions about the ratification of the Sixteenth Amendment, and
28 sending it to the president, congressman, and senators. Upon

1 closer examination, however, the ultimate objective of this four-
2 step program is to assist an individual's chances of successfully
3 defending against a criminal tax evasion conviction by invoking
4 the so-called "Cheek" defense. As such, Hempfling's
5 "petitioning"-related activities are actually designed to
6 perpetrate a fraud or "sham" against the courts and to encourage
7 criminal tax evasion. Defendant's motion to dismiss based on the
8 Norr-Pennington doctrine is **DENIED**. (Hempfling also argues that
9 the "Cheek" defense is not a sham. This argument is discussed
10 and rejected below.)

11
12 **6. Justiciability of Allegations Concerning the
"Cheek" Defense.**

13 Finally, Defendant specifically challenges those allegations
14 in the complaint concerning his alleged advocacy of the use of
15 the so-called "Cheek" defense. The "Cheek" defense is based upon
16 *United States v. Cheek*, 498 U.S. 192 (1991), in which the Supreme
17 Court held that an honest, good faith belief -- no matter how
18 unreasonable -- that one was not required to pay taxes or file a
19 tax return defeated a "willfulness" finding in a criminal tax
20 evasion case. Hempfling argues that it would not be proper for
21 this court to adjudicate the issue of whether advocacy of the use
22 of the Cheek defense by third parties (e.g., consumers of the
23 "Reliance 2000 package") constitutes fraud:

24 [A]ny consideration of [the "Cheek defense" leads to a
25 more fundamental problem since the government is asking
26 this Court to make a ruling and essentially give an
27 'advisory opinion' on an issue/controversy that is
28 simply not before it (and is probably non-justiciable
anyway): the probability that a particular defense will
prevail in a hypothetical criminal case. As this Court
is most likely aware, giving advisory opinions and
rulings on hypothetical cases/situations is strictly

1 forbidden. *Gator.com Corp v L.L. Bean, Inc.*, 398 F.3d
2 1125, 1132 (9th Cir. 2005). Federal courts are limited
3 only to adjudicating 'live controversies', not
4 hypothetical cases or issues. *Id.* Because the Court
cannot even entertain, much less adjudicate, this issue
in the amended complaint, it cannot form the basis of
any claim and should be dismissed.

5 (Doc. 43 at 6-7).)

6 The government does not respond directly to this argument in
7 its opposition. Critically, however, the allegations in the
8 complaint concerning Hempfling's advocacy of the "Cheek" defense
9 cannot be read in a vacuum. The Government has successfully
10 alleged a violation of the internal revenue code with respect to
11 Hempfling's promotion of the Reliance 2000 package, whereby
12 Hempfling advises and incites individuals to purchase, read, and
13 use a set of materials to criminally violate internal revenue
14 laws and to rely on a *Cheek* defense. Assuming, arguendo, that
15 the Government is able to ultimately obtain an injunction against
16 Hempfling's promotion of the Reliance 2000 package, Hempfling's
17 future promotion of the "Cheek" defense may not have any
18 consequence, because he would not be permitted to offer any
19 products in their present format and substance that provide the
20 basis of an alleged *Cheek* defense.

21
22 **D. Motion to Strike.**

23 Hempfling also moves, pursuant to Rule 12(f) and Local Rule
24 15-220, to strike those portions of paragraphs 15 and 16 of the
25 amended complaint which refer to the Declaration of Barbara
26 Cantrell, its contents and exhibits. (Doc. 44 at 2.) Hempfling
27 points out that although the declaration "is referred to in the
28 above paragraphs of the complaint, neither it, nor any of its

1 'exhibits' is attached to the complaint," in contravention of
2 Local Rule 15-220, which requires that "changed pleadings shall
3 contain copies of all exhibits referred to in the changed
4 pleading."

5 Although Defendant's understanding of the requirements of
6 Local Rule 15-220 is correct, Plaintiff's failure to attach the
7 declaration and/or its exhibits to the complaint does not merit
8 the extreme sanction of striking the relevant portions of
9 paragraphs 15 and 16.

10 Pursuant to Federal Rule of Civil Procedure 12(f), a party may
11 move to strike from any pleading "any redundant, immaterial,
12 impertinent or scandalous matter." However, motions to strike are
13 disfavored and infrequently granted. *Neveu v. City of Fresno*, 392 F.
14 Supp. 2d 1159, 1170 (E.D. Cal. 2005) ("[M]otions to strike should not
15 be granted unless it is clear that the matter to be stricken could
16 have no possible bearing on the subject matter of the litigation.").

17 A district court has broad discretion over the application of its
18 own local rules and it may overlook violations where there is no
19 indication that the opposing party is prejudiced. See *Green v. Baca*,
20 306 F. Supp. 2d 903, 913 n.40 (C.D. Cal. 2004).⁹ Defendant has

21
22 ⁹ Defendant correctly points out that the September 23, 2005
23 memorandum opinion in this case cited Local Rule 56-260(a) (requiring
24 the filing of a statement of undisputed fact along with any motion for
25 summary judgment) in the context of declining to consider certain of
26 defendant's arguments. (See Doc. 37 at 27-28.) But, Defendant
27 quotes the court's own language out of context. The entire
28 paragraph reads:

26 In the alternative to his Motion to Dismiss, Defendant
27 brings a "Motion for Summary Judgment." Defendant argues
28 that the Government should be estopped from bringing this
action against Defendant based on Defendant's contention

made no effort to establish prejudice in any form, perhaps because the referenced Declaration and its exhibits are already part of the record. (See Docs. 13-22, filed July 20, 2005.)

VI. CONCLUSION

For the reasons set forth above:

- (1) Defendant's Motion to Dismiss is **DENIED** in its entirety; and
- (2) Defendant's Motion to Strike is **DENIED**.

A scheduling conference will be held in this matter on March 23, 2006 at 8:45 a.m. before Judge Wanger in Courtroom Three. A joint scheduling report shall be filed at least three court days prior to the conference.

that the Government's attorney led him to believe he was not violating the law in a July 2004 telephone conversation. In addition, the Government construes two conclusory statements in Defendant's declaration a summary judgment motion on the issue of whether Defendant violated § 6700 and § 6701.⁷ Defendant's estoppel argument can be decided as a matter of law.

However, the arguments regarding violations of § 6700 and § 6701 will not be considered. Defendant has filed no Statement of Undisputed Facts, as is required by LR 56-260(a). Little if any discovery has been conducted in this case. Finally, these issues were not presented in a properly noticed summary judgment motion and will therefore not be construed as such.

(Id.) Under such circumstances, the record did not lend itself to resolution on summary judgment. The absence of a statement of undisputed fact was one factor evidencing the paucity of a factual record on the issues presented.

SO ORDERED

Dated: February 22, 2006

/s/ OLIVER W. WANGER

OLIVER W. WANGER
United States District Judge